Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

JASON M. RYAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

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Question Presented:

Whether a military defense counsel's refusal to honor a military servicemember's request to appeal his case to the Supreme Court effectively denies him that right under the UCMJ, and, whether that refusal to appeal constitutes ineffective assistance of counsel?

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PETITION FOR A WRIT OF CERTIORARI

Corporal Jason M. Ryan, a member of the United States Marine Corps, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces (CAAF) is reprinted in the Appendix A, at 1A. The final Ryan opinion authored by the Navy-Marine Corps Court of Criminal Appeals (NMCCA), Ryan II, is reprinted at Appendix B, at 2a-5a. The CAAF's remand of the Ryan case is reprinted at Appendix C, at 6a-7a. The first Ryan opinion authored by the NMCCA, Ryan I, is reprinted at 8a-22a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1259(3), which permits "review of cases in which the Court of Appeals for the Armed Forces granted a petition for review." The CAAF granted review of Corporal Ryan's petition for review on April 25, 2008.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, clause 14 of the United States Constitution vests with Congress the authority "To make Rules for the Government and Regulation of the land and naval Forces."

Article 70(c), UCMJ, states: "Appellate defense counsel shall represent the accused before the Court of Military Review, the Court of Military Appeals, or the Supreme Court--(1) when requested by the accused;..."

STATEMENT OF THE CASE

Corporal Ryan's case represents two important principles: first, members of the Armed Forces possess a statutory right to petition this Court through appointed counsel; and second, a servicemember should not bear the sentence and lifelong stigma of a bad-conduct discharge when a reviewing court mischaracterizes his misconduct.

Corporal Ryan therefore asks this Court for two related forms of relief: first, this Court should find that members of the Armed Forces have a right to petition the Supreme Court through appointed counsel; and second, this Court should reverse and remand Corporal Ryan's sentence for a full and fair sentence rehearing.

A. Facts

The case of Corporal Ryan case reads like an excerpt from the screenplay of *A Few Good Men*. Corporal Ryan was a squad leader for the Marine Security Force at Guantanamo. Corporal Ryan was convicted of maltreating his subordinates in various ways – similar to the "Code Red" lore from the silver screen.

Unlike the accused in most military court-martials, Corporal Ryan had a stellar Marine Corps record prior to the incidents of "hazing" for which he was convicted.

After Corporal Ryan completed boot camp, he went on to the School of Infantry where he went through specialized weapons training and graduated first in his class. With Corporal Ryan's sincere dedication and hard work, he was awarded Meritorious Lance Corporal. Living up to the expectations of this promotion, Corporal Ryan went through various training and other schools while in the Fleet. While serving as a member of the 26th MEU SOC, Corporal Ryan was awarded an early promotion to Corporal. Upon returning to Camp Lejeune, Corporal Ryan once again undertook extensive infantry and leadership training in preparation for his deployment to Cuba.

Corporal Ryan was put on non-commissioned officer (NCO) of the quarter boards, meritorious sergeant boards and was highly recommended for re-enlistment into the Marine Corps.

Corporal Ryan was the only non-commissioned officer (NCO) that took his Marines on patrols. While conducting such training missions, Corporal Ryan tried to teach his subordinate Marines what life was like in a combat zone. Corporal Ryan wanted his Marines to become closer than brothers and to understand that they needed to count on each other no matter what adversity they faced.

In the process of training his Marine subordinates, Corporal Ryan "hazed" them by ordering his Marines, for example, to dance.

Corporal Ryan did not "haze" his subordinate Marines in a manner any different than was done to him or his peers when they were new Marines. Corporal Ryan "hazed" subordinate Marines along with three other corporals who had all experienced the same treatment. The "training" was not designed to hurt junior Marines, but was designed to make them form a closer unit. In fact, two junior Marines in Corporal Ryan's squad did not say that he "hazed" them. These junior Marines agreed that Corporal Ryan was only trying to train them.

In another one of these "hazing" incidents, Corporal Ryan pointed a 9 mm pistol at the chest of one subordinate. This weapons-pointing incident occurred while Corporal Ryan conducted weapons training with another Marine leader. The other Marine, Chris VanVlet, and Corporal Ryan, were training subordinate Marines how to take down, clean and put back together the 9 mm service pistol. In this case, after the junior Marine had put the weapon back together, Corporal Ryan pointed the 9 mm pistol at the subordinate when the weapon was cleared and the slide was locked in the rear position.

Unlike civilians, Marines frequently point weapons at each other. Pointing weapons at one another is sometimes part of Marine training. When Marines conduct mock patrols, raids or firefights, pointing weapons at one other is common.

As a result of these "hazing" incidents, Corporal Ryan was sentenced to serve time in the brig, lost all of his rank, lost all his pay, and was awarded a bad-conduct discharge. Two of the other Marines that "hazed" subordinates along with Corporal Ryan received only a loss in rank and pay. They finished their Marine careers with Honorable Discharges.

B. Proceedings Below

At NMCCA, Corporal Ryan raised five assignments of error: 1) that a charge should have been dismissed because it contained a major change; 2) the need for a tailored "spillover" instruction for the jury after the government counsel made an inappropriate closing argument; 3) ineffective assistance of counsel due to lack of preparation; 4) factual and legal insufficiency; and 5) that a bad-conduct discharge was an inappropriately severe sentence, and a highly disparate one, for hazing.

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed Corporal Ryan's findings and sentence on March 29, 2007. Appendix D, 8A-22A, *Ryan I.*

But NMCCA's decision in Corporal Ryan's case rested on a legal error in regard to sentencing.

In 2005, the Court of Appeals for the Armed Forces (CAAF) reversed a sentence appropriateness holding by the Navy-Marine Corps Court of Criminal Appeals (NMCCA) in *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005). In that case, the Navy-Marine Corps Court had written, in part: "When reviewing a sentence it is important to consider the sense of justice of the community where the crime was

committed which should not be disturbed unless 'the harshness of the sentence is so disproportionate to the crime as to cry out for equalization.' *Rojas*, 15 M.J. at 919." *United States v. Baier*, No. NMCCA 200200476, slip op. at 2 (N-M. Ct. Crim. App. Oct. 23, 2003) (per curiam).

But NMCCA used the wrong sentence appropriateness standard, ruled the CAAF. NMCCA's language "is legally incorrect. A Court of Criminal Appeals must determine whether it finds the sentence to be appropriate. It may not affirm a sentence that the court finds inappropriate, but not 'so dispropor-tionate as to cry out' for reduction." In footnote 15 of its *Baier* opinion, the CAAF also observed that the legally erroneous "language that the lower court quoted originated in *United States v. Usry*, 9 M.J. 701, 704-05 (N.C.M.R. 1980)."

Despite the CAAF overruling *United States v. Usry*, the NMCCA cited that decision in its March 29, 2007 opinion upholding the appropriateness of Corporal Ryan's sentence. NMCCA improperly cited *Usry* for the following proposition: "A sentence should not be disturbed on appeal, 'unless the harshness of the sentence is so disproportionate as to cry out for sentence equalization.'" *United States v. Ryan*, No. NMCCA 200401577, slip op. at 8 (N-M. Ct. Crim. App. March 29, 2007).

The CAAF wasted little time calling NMCCA's error to that court's attention. Corporal Ryan filed a petition for grant of review on March 29, 2007. *United States v. Ryan*, No. 07-0601/MC, __ M.J. ___ (C.A.A.F. March 29, 2007). After Corporal Ryan's brief was filed, CAAF turned around the case in little more than three weeks, affirming NMCCA's ruling on the findings, but setting aside its decision on the

sentence. *United States v. Ryan*, No. 07-0601/MC, __ M.J. ___ (C.A.A.F. Aug. 23, 2007) (summary disposition).

The CAAF ruled: "The record of trial is returned to the Judge Advocate General of the Navy for remand to the Navy-Marine Corps Court for a new sentence appropriateness review in light of *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005)."

In Corporal Ryan's remanded argument before NMCCA, he argued that, first, the Government unconstitutionally infringed on his right to demand a trial by jury when it considered his not guilty pleas unfavorably as a lack of cooperation; and two, his sentence was inappropriately severe because his actions caused no lasting harm to his subordinates.

The undersigned counsel, then an active duty Judge Advocate in the Navy, argued those positions on Corporal Ryan's behalf. Both the NMCCA and the CAAF rejected these arguments. Appendix B, 2A-5A, *Ryan II*; Appendix A, 1A.

C. Representation Before This Court

The undersigned counsel left active duty in September 2007. Corporal Ryan was then detailed a new active duty Navy Judge Advocate as his appellate defense counsel.

After the CAAF granted Corporal Ryan's case, but summarily affirmed the decision below, neither the Navy-Marine Corps Appellate Defense Division, nor his detailed appellate defense counsel, contacted him to inform him of his legal options, including his statutory right to petition the United States Supreme Court for a writ of certiorari.

Corporal Ryan even contacted his new appellate defense attorney in writing to request continued representation. But the active duty defense counsel failed to respond to Corporal Ryan and failed to file a petition for a writ of certiorari before this Court.

Corporal Ryan then contacted the undersigned attorney, still a member of the United States Navy Reserve, with only days remaining before this Court's filing deadline, pleading for assistance.

The undersigned attorney, serving now as a Foreign Service Officer in Peshawar, Pakistan, agreed to assist and hastily assembled this Petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

Corporal Ryan asks this Court for two forms of relief: first, a holding by this Court that members of the Armed Forces have a right to petition the Supreme Court through appointed counsel; and second, Corporal Ryan requests that this Court reverse and remand his sentence for a full and fair sentence rehearing.

A military defense counsel violates his legal and ethical obligations to his client when he refuses to honor a military servicemember's request to appeal his case to the Supreme Court. Such a refusal effectively denies the servicemembers' right to appeal under the UCMJ, and, furthermore, such refusal constitutes ineffective assistance of counsel.

This Court should grant review because it effectively has original jurisdiction over this issue involving statutory interpretation of the UCMJ. No other court may authoritatively determine the right to representation before this Court.

Corporal Ryan requests that this Court grant his

petition as a companion case to *Knowles v. Mirzayance*, 127 S. Ct. 1247 (2007), to be argued this term, as a similar case where "failure to advance the defendant's only affirmative defense" judicial triggers scrutiny. Similar to Mirzayance's abandoned insanity defense, Corporal Ryan had a convincing sentence inappropriateness claim where he was sentenced to a bad-conduct discharge when his behavior amounted to something more akin to fraternity hazing than to criminal offenses. But Corporal Ryan's appellate defense attorney refused to advance these arguments before this Court.

Even if this Court concludes that Corporal Ryan's sentencing argument would ultimately fail, this Court should grant review because the underlying issue of representation arises in almost *all* military cases where the CAAF has granted review and is "capable of repetition, yet evading review." *See Honig v. Doe*, 484 U.S. 305 (1988); *Roe v. Wade*, 410 U.S. 113, 125 (1973). Servicembers will never know of their rights if their attorneys fail to communicate with them or advise them, as in this case. Finally, lower courts may not authoritatively announce that servicemembers possess a right to representation under the UCMJ before this Court. Only this Court may authoritatively declare that a statutory right to representation before this Court exists under the UCMJ.

I. THE UCMJ AND MILITARY REGULATIONS REQUIRE MILITARY DEFENSE COUNSEL TO REPRESENT APPELLANTS BEFORE THIS COURT.

Corporal Ryan's right to representation before this Court was effectively denied. A military defense

counsel violates his legal obligation to his client when he refuses to honor a military servicemember's request to appeal his case to the Supreme Court. Such a refusal effectively denies the servicemembers' right to appeal under the UCMJ.

Article 70(c), UCMJ, mandates representation: "Appellate defense counsel shall represent the accused before the Court of Military Review, the Court of Military Appeals, or the Supreme Court--(1) when requested by the accused;..."

The Manual of the Judge Advocate General, JAG Instruction 5800.7E, 20 June 2007, Section 0164(e), states that appellate review is not complete until, including, when the Supreme Court completes review of a case.

The Court of Appeals for the Armed Forces (CAAF) has found that servicembers possess a statutory right to representation before this Court. In 2006, Air Force Staff Sergeant Lovett filed a pro se petition for writ of mandamus at the CAAF, asking the CAAF to order the Judge Advocate General of the Air Force to provide him with counsel to represent him before this Court in challenging the CAAF's affirmance of his court-martial conviction and 14-year sentence. *Lovett v. United States*, 64 M.J. 232 (C.A.A.F. 2006). The CAAF granted the requested writ without dissent. The CAAF ruled:

> The Uniform Code of Military Justice provides: "Appellate defense counsel shall represent the accused before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court . . . when requested by the accused . . . ." Article 70(c)(1), UCMJ, 10 U.S.C. § 870(c)(1) (2000).

> Petitioner's case is not final as a matter of law. *See* Article 71(c), UCMJ, 10 U.S.C. § 871(c) (2000). The immediate question before us is not whether counsel must file any particular matter in the course of representing a servicemember, but whether counsel may discontinue such representation before the case is final as a matter of law. Nothing in the record of the present case established a basis for counsel to sever the lawyer-client relationship. Accordingly, it is ordered that the Judge Advocate General of the Air Force shall provide appellate defense counsel to represent Petitioner for the purposes of review of his court-martial under Article 67a, UCMJ, 10 U.S.C. § 867a (2000).

Id. at 232-33.

Appellate defense counsel subsequently filed a certiorari petition on SSgt Lovett's behalf, which this Court denied. *Lovett v. United States*, 127 S. Ct. 1333 (2007). So while a servicemember in Corporal Ryan's position could probably obtain appellate representation by filing a pro se petition for extraordinary relief at the CAAF, Corporal Ryan, and servicemembers like him in a similar position, probably would not know without a lawyer's advice that he or she could obtain representation by filing a pro se petition for extraordinary relief at the CAAF. And in this case, Corporal Ryan has specifically requested the undersigned attorneys continued representation.

This Court should grant review of Corporal Ryan's case because it essentially has original

jurisdiction over the statutory interpretation of the UCMJ on this issue. Even though the CAAF has addressed this issue, no other court may authoritatively determine the right to representation before this Court.

II. A Defense Attorney Has an Ethical and Professional Obligation to File a Petition with this Court if the Client Makes the Request.

Corporal Ryan's appellate defense attorney had an ethical and professional obligation to file a petition for a writ of certiorari with this Court. Under the military justice system, the United States Court of Appeals for the Armed Forces (CAAF) serves a "gatekeeper" role. Under 28 U.S.C. § 1259(3), this Court only has jurisdiction in those few cases where the CAAF grants review. The CAAF is a discretionary court and rejects the vast majority of military appeals it reviews each year. (In a typical year, the CAAF grants review of approximately 100 military cases out of around 2,000 military appeals).

Corporal Ryan's sentencing argument was not frivolous. His case was in that rare minority where the CAAF had granted review. The relatively small numbers of cases where the CAAF grants review are significant; this Court should not be deterred from vigorously supporting an appellant's right to appeal to this Court with a false fear of being overrun with military petitions. Because the CAAF will continue to perform its "gatekeeping" role, the small numbers of potential military appeals ensure that this Court will not be overrun with military cases.

This Court has seldom exercised certiorari jurisdiction over cases involving servicemembers. This Court has granted plenary review of decisions by the Court of Appeals for the Armed Forces (CAAF) to only eight court-martial cases since Congress established that authority 25 years ago under the Military Justice Act of 1983.[1]

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[1] *Solorio v. United States*, 483 U.S. 435 (1987), the biggest victory for the government in a military justice case over the last quarter century, abolishing the "service connection" requirement; *Weiss v. United States*, 510 U.S. 163 (1994), a net gain for the government when this Court adopted a due process test for the military justice system less searching than the Court of Military Appeals' decision, or even than that advocated by Weiss's counsel or government counsel. *See id.* at 173-77; *Davis v. United States*, 512 U.S. 452 (1994), this Court upheld the CAAF's rejection of a *Miranda/Edwards* challenge, but on grounds far more favorable to the prosecution than those upon which CMA had relied; *Ryder v. United States*, 515 U.S. 177 (1995), the only Military Justice Act of 1983 case in which this Court held oral argument and ruled for the defense, invalidating the grounds on which Chief Judge Baum originally served on the Coast Guard Court, leading to his reappointment under different authority. But on remand, neither Petty Officer Ryder nor any of his fellow Coastguardsman whose cases were granted and remanded under *Ryder* received more favorable treatment during their second review; *Loving v. United States*, 517 U.S. 748 (1996), affirmed the CAAF's affirmance of a military death sentence; *Edmond v. United States*, 520 U.S. 651 (1997), affirmed the CAAF's affirmance of the basis for Chief Judge Baum's reappointment to the Coast Guard Court; *United States v. Scheffer*, 523 U.S. 303 (1998), this Court reversed a CAAF decision holding that despite Military Rule of Evidence 707, an accused had a Sixth Amendment constitutional right to at least attempt to lay a foundation for an exculpatory polygraph's admissibility; *Clinton v. Goldsmith*, 526 U.S. 529 (1999), this Court restricted CAAF's exercise of jurisdiction, reversing a favorable ruling for an Air Force major.

This Court has generally exercised certiorari jurisdiction over court-martial cases in a manner that moved the law in the prosecution's favor. Of the eight court-martial cases this Court has reviewed since 1983 (*Solorio*; *Weiss*; *Davis*; *Ryder*; *Loving*; *Edmond*; *Scheffer*; *Goldsmith*), the government won seven of those eight cases. This included two reversals of decisions by the CAAF favorable to a servicemember (*Edmond* and *Scheffer*). In practice, even more significantly, this Court has three times affirmed CAAF decisions favoring the government on grounds more advantageous to the prosecution than those relied upon by the CAAF (*Solorio*; *Weiss*; *Davis*). And in the only court-martial case in which this Court heard oral argument and then ruled for the defense, the accused received no meaningful relief as a result (*Ryder*).

The eight court-martial cases over which this Court has exercised plenary review do not exhaust the effects of the Military Justice Act of 1983, because this Court summarily reversed and remanded several additional CAAF cases, at least one of which actually resulted in sentence relief for the service member.

The last 25 years reflects a record of incredible futility for the military defense bar before this Court. In the eight cases to receive plenary consideration under the Military Justice Act of 1983, not a single service member received any meaningful relief.[2]

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[2] There is only one servicemember who actually received sentence relief as the result of a proceeding under authority of the Military Justice Act of 1983. In 1984, the CMA affirmed the findings and sentence, which included a bad-conduct discharge and three months' confinement, of Spec4 Johnnie K. Goodson. *United States v. Goodson*, 18 M.J. 243 (C.M.A. 1984). This

In a quarter of a century under the Military Justice Act of 1983, the defense bar has collectively erased the findings of guilty to six specifications and eliminated just one bad-conduct discharge. The government, on the other hand, has reinstated one conviction, reinstated a bad-conduct discharge, dropped an officer from the rolls, and made the overall legal terrain considerably more friendly to the prosecution. Given this 25-year history, a military appellate defense counsel could conclude that submitting a certiorari petition on behalf of his servicemember client would be either futile or frivolous.

But such a conclusion would be wrong.

If a military appellate defense attorney gives up the ghost and surrenders a servicemember's case – against the client's wishes – and fails to file a

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Court granted and remanded the case for further consideration in light of *Smith v. Illinois*, 469 U.S. 91 (1984). *Goodson v. United States*, 471 U.S. 1063 (1985). On remand, the Army Court of Military Review (ACMR) set aside the findings of guilty to four specifications, affirmed the findings of guilty to other specifications, and upon reassessment, set-aside the bad-conduct discharge. *United States v. Goodson*, 22 M.J. 947 (A.C.M.R. 1986). Eighteen years after the Goodson grant and remand, this Court granted and remanded another court-martial case, this time for further consideration in light of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). *O'Connor v. United States*, 535 U.S. 1014 (2002). On remand, the Air Force Court of Criminal Appeals (AFCCA) set-aside the findings of guilty to two of the numerous specifications of which SrA O'Connor had been convicted and upheld the original sentence. *United States v. O'Connor*, No. ACM 33671, 2003 CCA LEXIS 251 (A.F. Ct. Crim. App. Oct. 29, 2003), *aff'd*, 60 M.J. 118 (C.A.A.F. 2004).

certiorari petition before this Court based on a tiny sample of only ten cases – the decision is illogical, illegal and unethical.

Surrendering is illogical based on such a small sample of cases and a select few issues. Such fatalism also represents the logic of the self-fulfilling prophecy – a community of military defense lawyers who invent a conventional wisdom that this Court will not grant certiorari of a military case.

Surrendering is illegal because the UCMJ mandates representation in plain language.

Surrendering is unethical because a lawyer's duty is to fight for his client until the end. Under such guidance as ABA Standards, The Defense Function (3rd Ed. 1993) and ABA Ethics Opinion 280 (1949), Corporal Ryan's appellate defense attorney should have file a petition for a writ of certiorari with this Court.

III. Reasonable Performance Involves Advancing the Client's Interest or Communicating with the Client to Explain Why the Lawyer Refuses to Do So.

Corporal Ryan's active duty appellate defense attorney was ineffective by refusing to file a petition for a writ of certiorari before this Court. Under *Strickland v. Washington*, 466 U.S. 688 (1984), his appellate defense counsel's choice to abandon all arguments and simply refuse to file an appeal before this Court was not reasonable performance. *See Wiggins v. Smith*, 539 U.S. 510 (2003).

It is never reasonable for a defense attorney to simply surrender *all* defenses. The *Strickland* standard provides generous coverage for defense

attorneys who abandon some defenses in favor of others; it provides no defense attorneys who abandon *all* of them. There is no tactical reason to abandon all defenses.

Moreover, it is never reasonable for a defense attorney to fail to communicate with his client why he refuses to pursue an appeal.

This Court held in *Anders v. California*, 386 U.S. 738 (1967), that indigents seeking review of a conviction warranted the services of an advocate under the Fourteenth Amendment. The Court concluded that if counsel conscientiously decides that an appeal is "wholly frivolous," he should so advise the court and request permission to withdraw, at the same time furnishing the court and the indigent with a brief of anything in the record arguably supporting the appeal. *Anders* at 744.

In *Evitts v. Lucey*, 469 U.S. 387, 394 (1985), the Court held that counsel "must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim."

Unfortunately for military appellants, the inherently conservative nature of military society, *Parker v. Levy*, 417 U.S. 733 (1974), deters many judge advocates from aggressively asserting their client's rights. Defense work is sometimes seen as a necessary, but drudging phase of a longer legal career in which one's *own* professional reputation is more important than the client's interests.

Another servicemember who petitioned this Court with a writ of certiorari is First Lieutenant Raymon F. Thomas, USMC. His case was decided by the CAAF on the same day as Corporal Ryan's case was decided. The undersigned attorney also represented

1st Lt Thomas while an active duty Navy Judge Advocate. When 1st Lt Thomas requested that his new active duty attorney file a petition to the United States Supreme Court, here was the response he received on April 30, 2008:

> LT Thomas,
>
> Whether you think the court got it right or not, they have made their decision. Your case is over. There is nothing more that can be done. You have to live with the consequences of your decisions and your action. It is not that you don't have what could be good issues, its that the court read your case, and a grant means the entire court read the entire record of trial, and the court decided not to grant you relief. Whether you think they are right or not, their decision is final. Their decision is subject only to review by the Supreme Court and the issues in your case are not issues which the Supreme Court will grant cert on. Yes, CAAF can decide what cases it wants to hear and what cases it does not want to hear. It has that statutory authority. Again, my legal opinion is that there is nothing more that can be done in your case that has even a remote chance of success. For all intents and purposes, your case is final, whether you like it or not. I'm sorry you may regret some of your decisions, but they cannot be undone. CAAF heard your case, and you lost. That's it.
>
> R,
> LCDR R

The problem of abandoning clients is endemic to the military justice system. From this Court's October 2002 term through its October 2006 term, the Army Defense Appellate Division has not filed a single certiorari petition. In that time, seven cert petitions have been filed in Army cases, but five (*Christian*, *Shelton*, *Adams*, *Ronghi*, *Glover*) were filed pro se IFP while two (*Crousser*, *Saintaude*) were filed by civilian counsel.

During that same period, eight certiorari petitions were filed by the Air Force Appellate Defense Division (*Lovett*, *Jenkins*, *Keyser*, *Davis*, *Traum*, *Moses*, *Robinson*, *Phillips*), though one, *Lovett*, was filed after Lovett won a writ from CAAF compelling continued representation. One additional Air Force case (*Johnson*) was filed pro se IFP.

The Coast Guard appellate defense counsel filed only one cert petition (*Stirewalt*).

During that same time span, Navy-Marine Corps Appellate Defense Division filed 14 certiorari petitions (*Craig*, *Rose*, *Washington*, *Parker*, *Magyari*, *Quintanilla*, *Fisher*, *Disney*, *Pratchard*, *Ribaudo*, *Allen*, *Strother*, *Dowty*, *Hurn*), while civilian counsel filed cert petitions in another three Navy-Marine Corps cases (*McKeel*, *Lucas*, *House*). No sailor or Marine filed a *pro se* cert petition during that period.

Reviewing the CAAF opinions in military cases where the accused lost reveals many cases where the accused lost an issue that rise about the "frivolous" standard.

The counter-argument is that the fourteen certiorari petitions filed by the Navy-Marine Corps Appellate Defense were a grand waste of time, since all of these cases were ultimately denied by this Court. But it is not a counsel's duty to decide

whether an issue is worthy of certiorari, much less whether it is likely to be granted; rather, it is a counsel's duty to decide whether the issue clears the frivolousness hurdle. Many cases will exceed the frivolousness standard but fail the "certworthiness" standard. It is a military appellate defense counsel's duty to file a cert petition in those cases, if the client asks counsel to do so.

When the number of certiorari petitions filed by the appellate defense division of the largest branch of our military since 18 November 2002 is precisely zero, it seems apparent that there is a problem. The problem is that military appellate defense counsel are not performing their ethical or statutory duties.

There is yet one more reason for this Court to grant review of Corporal Ryan's case. Earlier this year, in its *Kennedy v. Louisiana* opinion, this Court appeared to overlook military law (Section 552(b) of the National Defense Authorization Act for Fiscal Year 2006, 119 Stat. 3136, 3264 (2006)), a congressional statute expressly authorizing the death penalty for the rape of a child. No attorney, clerk, or justice seemed to notice.

This Court almost never grants review of military cases. Many years ago, Professor Schlueter gave a Hodson lecture he called, "Military Justice for the 1990's — A Legal System Looking for Respect." *See* 133 Mil. L. Rev. 1 (1991).

Granting Corporal Ryan's case will reverse the sense that this Court largely ignores the military justice system. This Court should rigorously affirm the right of servicemembers to be represented before this Court, especially after enemy combatants have received more review by this Court than our own servicemembers have.

Servicemembers lose many rights when they volunteer to serve our nation. *Parker v. Levy*, 417 U.S. 733 (1974). They also subject themselves to a host of much stricter criminal sanctions under the UCMJ. Accordingly, those servicemembers who request to have their cases reviewed by this Court under 28 U.S.C. § 1259(3) and 10 U.S.C. § 870(c), Art. 70(c), UCMJ, should be granted that right.

This Honorable Court should grant review of Corporal Ryan's case because he was denied the right to present a full and fair sentence appropriateness argument before this Court when his active duty appellate defense counsel refused to file a petition for a writ of certiorari before this Court.

CONCLUSION

Corporal Ryan respectfully requests the Court grant this petition for a writ of certiorari.

Respectfully submitted,

Darrin W.S. MacKinnon*
Lieutenant, JAGC
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**Counsel of Record*

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September 2008

Appendix A

UNITED STATES, Appellee,

v.

Jason M. RYAN, Corporal, U.S. Marine Corps, Appellant.

No. 07-0601

Crim. App. No. 200401577.

United States Court of Appeals for the Armed Forces

April 25, 2008

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, said petition is hereby granted, and the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Appendix B
(Ryan II)

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
E.E. GEISER, V.S. COUCH, D.E. O'TOOLE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JASON M. RYAN
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 200401577
GENERAL COURT-MARTIAL

Sentence Adjudged: 13 April 2004.
Military Judge: Maj Paul McConnell, USMC.
Convening Authority: Commanding General, 2d Marine Division, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: LtCol J.K. Keith, USMC.
For Appellant: LT Darrin MacKinnon, JAGC, USN; LT J.M. Lokey, JAGC, USN.
For Appellee: Capt Brian K. Keller, USMC; LT Derek Butler, JAGC, USN.

31 January 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of violating a lawful general order, four specifications of maltreatment of a subordinate, and assault, in violation of Articles 92, 93, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 893, and 928. The appellant was sentenced to confinement for 3 months, hard labor without confinement for 3 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

We previously affirmed the approved findings and sentence in an unpublished decision issued on 29 March 2007. On 23 August 2007 our superior court affirmed our decision as to findings but set aside the decision as to sentence. The case was remanded to this court for a new sentence appropriateness review in light of *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005). *United States v. Ryan*, 65 M.J. 328 (C.A.A.F. 2007)(summary disposition). The appellant was given an opportunity to submit additional matters for consideration and elected to resubmit and somewhat expand a summary assignment of error relating to sentence severity and disparity. In

addition, the appellant now raises a claim relating to post-trial processing.[1]

We have examined the record of trial, the appellant's various pleadings to include his two supplemental assignments of error, and the Government's responses. We conclude that the approved sentence is correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59 (a) and 66(c), UCMJ.

Sentence Appropriateness

The appellant argues that a bad-conduct discharge is inappropriately severe because the misconduct "did not cause any lasting physical or emotional harm to his subordinate Marines." Appellant's Brief and Assignments of Error of 25 Oct 2007 at 4. We have considered the appellant's record, his pretrial confinement and pretrial restriction, and the entire record of trial. We have also considered the seriousness of his offenses.

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[1] The Government's answer of 21 June 2006 includes argument suggesting that the CA may have improperly considered the appellant's not guilty pleas unfavorably as a lack of cooperation. While this issue was forfeited by the appellant when he failed to raise it prior to our 29 March 07 decision, we also note that the issue is without merit as the language identified by the appellant is clearly speculation by the appellate Government counsel as to why the CA *may have* acted more severely in the instant case. There is no evidence and no assertion that the CA actually considered any of the matters speculated by the appellate Government counsel.

The appellant ordered his subordinates to participate in humiliating, dangerous, and degrading conduct including sexually perverse acts. He did this to young inexperienced Marines in Cuba who had been taught to trust the appellant as a Corporal and as their squad leader. This type of conduct strikes directly at the trust and confidence needed to maintain unit cohesion, morale, and combat effectiveness. The maximum punishment authorized at this court-martial was confinement for 8 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. After reviewing the entire record, we conclude that the sentence is appropriate for this offender and his offenses. *Baier*, 60 M.J. at 382; *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).[2]

Conclusion

The findings were previously affirmed by this court and our superior court. We once again affirm the approved sentence.

For the Court

R.H. TROIDL
Clerk of Court

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[2] The appellant's remaining argument that his sentence was highly disparate from the sentences of other Marines who were involved in similar conduct is also without merit. He fails to offer any evidence beyond the general nature of the charges that his case was "closely related" to the cited cases. *See United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999).

Appendix C

UNITED STATES, Appellee,

v.

Jason M. RYAN, Corporal, U.S. Marine Corps, Appellant.

No. 07-0601

Crim. App. No. 200401577.

United States Court of Appeals for the Armed Forces

August 23, 2007

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, it is noted that that court set aside Specifications 1 and 2 of Charge I (violation of a lawful regulation), Specifications 1 and 2 of Charge II (maltreatment by sexual harassment), Specifications 1 and 2 of Charge IV (adultery), and the Specification of the Additional Charge (fraternization).

The court then stated that the remaining approved findings of guilty were affirmed. In fact, Charge II and all five of its specifications had been withdrawn by the Government as part of the plea agreement and dismissed.

Moreover, Specification 1 of Charge I and Specification 1 of Charge IV were merged into Specification 2 of Charge III (conduct unbecoming an officer). Likewise, Specification 2 of Charge I and the

Additional Charge and its Specification were merged into Specification 1 of Charge III (conduct unbecoming an officer).

Despite the court's broad statement that the remaining findings of guilty were affirmed, it then suggested that "[t]he affirmed charges and specifications reflect two separate instances of conduct unbecoming an officer to include a specific *quid pro quo* offer by the Appellant of time off from work in return for sex from a subordinate female Marine."

In fact, four specifications of a single charge of conduct unbecoming an officer remained. Under Article 67(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(c) (2000), this Court can only act with respect to findings as affirmed by a court of criminal appeals.

Accordingly, because of the ambiguity as to the affirmed findings, it is ordered that said petition is hereby granted. The decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside, and the record of trial is returned to the Judge Advocate General of the Navy for remand to the United States Navy-Marine Corps Court of Criminal Appeals for clarification as to the affirmed findings.

Appendix D
(Ryan I)

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.
BEFORE
J.D. HARTY R.G. KELLY W.M. FREDERICK

UNITED STATES

v.

Jason M. RYAN
Corporal (E-4), U. S. Marine Corps

NMCCA 200401577 Decided 29 March 2007

Sentence adjudged 13 April 2004. Military Judge: P.H. McConnell. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, U.S. Marine Forces, Atlantic, Camp Lejeune, NC.

LT J.M. LOKEY, JAGC, USN, Appellate Defense Counsel
Capt BRIAN KELLER, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

A members panel with enlisted representation, sitting as a general court-martial, convicted the

appellant, contrary to his pleas, of violating a lawful general order, four specifications of maltreatment, and assault, in violation of Articles 92, 93, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 893, and 928. The appellant was sentenced to confinement for 3 months, hard labor without confinement for 3 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.

We have examined the record of trial, the appellant's five assignments of error,[3] and the Gov-

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[3] I. THE MILITARY JUDGE ERRED WHEN HE FAILED TO DISMISS CHARGE II FOR CONTAINING A MAJOR CHANGE.

II. THE MILITARY JUDGE ERRED WHEN HE FAILED TO TAILOR A SPILLOVER INSTRUCTION FOR THE MEMBERS AFTER TRIAL COUNSEL'S INAPPROPRIATE CLOSING ARGUMENT.

III. CORPORAL RYAN, USMC, WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE COUNSEL WAS PREVENTED FROM ADEQUATELY PREPARING FOR TRIAL.

IV. THE GOVERNMENT FAILED TO PRESENT FACTUALLY AND LEGALLY SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT CORPORAL RYAN, USMC, COMMITTED THE CHARGED OFFENSES. FURTHERMORE, THE GOVERNMENT EVIDENCE WAS NOT ENOUGH TO OVERCOME THE GOOD MILITARY CHARACTER EVIDENCE PRESENTED BY THE DEFENSE.

ernment's response. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was deployed as a Marine squad leader with a portion of 3d Battalion, 6th Marine Regiment, a security force sent to Guantanamo Bay, Cuba, from June 2002 until July 2003. Lance Corporal (LCpl) J, LCpl S, Private First Class (PFC) D, and PFC S, were members of the appellant's squad. During this deployment, the appellant hazed and maltreated these Marines, and in one instance, assaulted a Marine under his charge. Essentially, the appellant was administering his own brand of punishment to these Marines when he found them performing in what he perceived to be a substandard manner. CA's Action of 28 Oct 2004.

Major versus Minor Change

In his first assignment of error, the appellant contends that the military judge abused his discretion by allowing the Government to amend the specification under Charge II, alleging a failure to

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V. A BAD-CONDUCT DISCHARGE IS AN INAPPROPRIATELY SEVERE SENTENCE GIVEN THE NATURE AND CIRCUMSTANCES OF THE OFFENSES AND THE SIGNIFICANT MATTERS IN EXTENUATION AND MITIGATION. ADDITIONALLY, THE PART OF THE SENTENCE RELATING TO THE BAD-CONDUCT DISCHARGE IS HIGHLY DISPARATE FROM THE SENTENCE OF OTHER MARINES WHO WERE INVOLVED IN SIMILAR CONDUCT.

obey a lawful general order under Article 92, UCMJ. Specifically, the Government added the numbers "1700.28" after the words "Marine Corps Order" and added the words "on divers occasions" before the words "between August 2003 and October 2003,". The appellant contends that the amendments effected an impermissible major change, contrary to RULE FOR COURTS-MARTIAL 603, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), because it added substantial material and was of such a nature that it was likely to mislead the accused as to the offense charged. Appellant's Brief of 13 Jan 2006 at 5. We find that the amendments to the specification effected a minor change and that the military judge did not violate R.C.M. 603 by permitting the amendments.

R.C.M. 603 governs changes made to charges and specifications. R.C.M. 603(b) permits the Government to make minor amendments to a specification at any time prior to arraignment. After arraignment, only the military judge may permit minor changes to be made provided "no substantial right of the accused is prejudiced." R.C.M. 603(c). Minor charges are defined by R.C.M. 603(a) as "any except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to offenses charged." The Discussion to R.C.M. 603(a) notes that minor changes include those changes "necessary to correct inartfully drafted or redundant specifications; to correct a misnaming of the accused; to allege the proper article; or to correct other slight error." In contrast, R.C.M. 603(d) permits major changes to be made over the objection

of the accused only if the charges are re-preferred. The question before us then is whether the amendment to the specification of Charge II was a major or minor change.

In the sole specification under Charge II, the appellant was charged with violating a lawful general order. Specifically, the specification alleged that the appellant did: "between about August 2003 and October 2003, violate a lawful general order, to wit: paragraph 4, Marine Corps Order, dated 18 June 1997, by wrongfully hazing" the named Marines. Charge Sheet. At the Article 32, UCMJ, pretrial investigation, the appellant fully explored the conduct at issue in this specification and charge. Moreover, upon completion of the Article 32 investigation, the appellant received a copy of the investigating officer's report which recommended inclusion of the additional language specifying the number of the Marine Corps Order violated, and the addition of the words "divers occasions". Investigating Officer's Report of 16 Jan 2004. Prior to referral, the Government amended the specification to include the additional language. Charge Sheet. At his arraignment, the appellant did not object to the changes. Record at 25. Only later, during pretrial motions, did the appellant object to the changes. Record 104, 123-24; Appellate Exhibit VIII.

We find that the amendments to the specification are minor changes within the meaning of R.C.M. 603(a), to correct inartful drafting and obvious scrivener's errors. The amendments do not alter the gravamen of the offense, nor the misconduct by which the appellant allegedly violated that provision.

The changes do not add any substantial matter that was not already fairly included in the previously preferred charges. There is no evidence that the appellant was misled, surprised, or hindered in his trial preparation in any way by these changes. Furthermore, we are convinced that under the facts of this case, there was no possible prejudice to the appellant as a result of the changes. Thus, we find that the military judge did not violate R.C.M. 603 by determining that these were minor changes. This assignment of error without merit.

Spillover Instruction

In his second assignment of error, the appellant argues that the military judge erred when he did not tailor the spillover instruction after the trial counsel's alleged inappropriate argument. Appellant's Brief at 7.[4] The appellant asks this court to set aside the findings and sentence and dismiss the charges and specifications. We do not find error, therefore, we decline to grant relief.

We review a military judge's decision not to tailor a defense-requested instruction for an abuse of discretion. *United States v. Myers*, 51 M.J. 570, 578 (N.M.Ct.Crim.App. 1999)(citing *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996)).

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[4] We note that the appellant's counsel indicates in his brief that the trial defense counsel made an immediate objection to the Government's argument, when in fact, there was no objection during the argument, but rather a request for a more narrowly tailored instruction at the completion of argument. Record at 668.

In his rebuttal argument on findings, the trial counsel argued:

> Should you find for instance the Article 93, the maltreatment. If you take a look at the elements and you say, [m]aybe that is not Article 93. The government believes at the barest minimum all of these factors constitute -- take a look at all of them, the bare minimum you have [is] hazing by the accused.

Record at 667.

At the conclusion of the trial counsel's argument, the trial defense requested a "more narrowly tailored" spillover instruction. *Id.* at 668. The military judge denied this request, and instead, gave a general spillover instruction, stating:

> Spillover. Each offense charged must stand on its own and you must keep the evidence of each offense separate. The burden is on the [G]overnment to prove each element of each offense by legal and competent evidence beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.

Id. at 691.

The appellant now alleges that the military judge erred in not tailoring the spillover instruction because there was great danger of spillover since much of the testimony was overlapping and confusing. Appellant's Brief at 8. We disagree.

It is axiomatic that the fundamental fairness guarantee of the Due Process Clause of the Constitution requires the prosecution to prove each and every element of every offense alleged against an accused by legal and competent evidence beyond a reasonable doubt. *Myers*, 51 M.J. at 578 (citing *Estelle v. McGuire*, 502 U.S. 62, 78 (1991)(O'Connor, J., concurring in part and dissenting in part)). When separate offenses are joined together for trial at the same time, there is a very real possibility that members will use the evidence of one of the crimes to infer a criminal disposition on the part of an accused in regard to other crimes charged. *Myers*, 51 M.J. at 579. "Generally, the law seeks to prevent juries from cumulating the evidence of the various crimes charged to find guilt when, if considered separately, they would not so find." *Id.* (citing *Drew v. United States*, 331 F. 2d 85, 87 (D.C. Cir. 1964)). This court has held that "[w]e are apparently comfortable in military practice with the assumption that properly drafted and delivered instructions are sufficient to prevent juries from cumulating evidence, thus avoiding improper spillover." *Myers*, 51 M.J. at 579. Absent evidence to the contrary, courts of military appeals may presume that members followed the military judge's instructions. *Loving*, 41 M.J. at 235; *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991).

Based on our review of this case, we find that the military judge's decision to give a standard spillover instruction was proper and that no spillover occurred. Contrary to the appellant's assertion, the trial counsel's argument was proper comment on the related offenses and the evidence before the court.

Trial counsel was not making a spill-over "smoke and fire" argument which tied the two offenses together by cumulating the evidence. Nor was trial counsel urging the use of evidence of one charge to bolster the other charge. Rather, the trial counsel was arguing that if the same evidence could not be used to support each of the elements under both the Article 93 and Article 92 charge, then it could be used to support the orders violation charge under Article 92. Clearly, trial counsel was arguing for contingencies of proof, and not arguing for the merging of evidence. Hence, we find there was no need for a tailored instruction on spillover. Moreover, the military judge's instructions were sufficient to focus the attention of the court members on each charge and specification and to keep the evidence separate for each specification. The members properly applied the military judge's instructions and distinguished between the two charges as evidenced by the fact that they found the appellant guilty of the specifications under Article 93 by meticulously excepting certain allegations of the charged misconduct from the specifications. Thus, we are confident that spillover did not occur, and that the appellant's substantial rights were not prejudiced. We find this claim without merit.

Effective Assistance of Counsel

In his third assignment of error, the appellant avers that his counsel was ineffective at trial because he was denied time and access to relevant and necessary evidence. Appellant's Brief at 12. Specifically, the appellant argues that his trial defense counsel was prevented from adequately preparing for trial because: (1) he was denied the

ability to view the crime scene by the Staff Judge Advocate and the military judge; (2) he had extreme difficulty in interviewing witnesses; and, (3) the defense was rushed to trial. Appellant's Brief at 9-10. We disagree.

We apply a presumption that counsel provided effective assistance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). This presumption is rebutted only by "a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms." *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005)(citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)). Even if defense counsel's performance was deficient, the appellant is not entitled to relief unless he was prejudiced by that deficiency. *United States v. Quick*, 59 M.J. 383, 385 (C.A.A.F. 2004)(quoting *Strickland*, 466 U.S. at 687).

In this case, we do not find any deficiencies in the defense counsel's performance under the *Strickland* standards. To the contrary, trial defense counsel effectively represented the appellant at trial on all charges. The trial defense counsel made numerous successful motions, requested and received a continuance, vigorously cross-examined the witnesses against his client, and put on a strong case of good military character. In addition, he was successful in having several specifications withdrawn, having the members return a finding of not guilty to four specifications, and convincing the members to except out much of the charged misconduct in their findings. We find that the appellant received effective assistance of counsel,

and was not deprived of a fair trial. This assignment of error is without merit.[5]

Sentence Appropriateness

In his fifth assignment of error, the appellant asserts that a bad-conduct discharge is an inappropriately severe sentence. We disagree.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). Courts of Criminal Appeals are tasked with determining sentence appropriateness, as opposed to bestowing clemency, which is the prerogative of the convening authority. *Healy*, 26 M.J. at 395. A sentence should not be disturbed on appeal, "unless

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[5] We have considered the appellant's fourth assignment of error challenging the legal and factual sufficiency of the evidence. Considering the evidence in the light most favorable to the prosecution, we conclude that a reasonable factfinder could have found all the essential elements of violating a lawful general order, four specifications of maltreatment, and assault beyond a reasonable doubt. *See United States v. Roderick*, 62 M.J. 425, 429 (C.A.A.F. 2006)(citing *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt.

the harshness of the sentence is so disproportionate as to cry out for sentence equalization." *United States v. Usry*, 9 M.J. 701, 704 (N.C.M.R. 1980).

In the present case, the appellant, a squad leader and noncommissioned officer of Marines, was found guilty of violating a general order prohibiting hazing, maltreating his Marines, and assaulting a Marine subordinate. After reviewing the entire record, and taking into consideration the appellant's excellent military record, we find that the adjudged sentence is appropriate for this offender and his offenses. *Healey*, 26 M.J. at 395; *Snelling*, 14 M.J. at 268.

Sentence Disparity

As part of his fifth assignment of error, the appellant contends that his sentence, including a bad-conduct discharge, is highly disparate from the sentences of other Marines who were involved in similar conduct. Appellant's Brief at 16. In support of his claim of sentence disparity, the appellant relies on the results of trial and sentence limitation portions of pretrial agreements of other Marines convicted at Camp Lejeune, North Carolina for hazing, maltreatment, and assault, which were included as part of Defense Exhibit A and the appellant's Clemency Request of 29 August 2004.

As a general rule, sentence comparison is appropriate only in those instances of highly disparate sentences adjudged in closely related cases. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Olinger*, 12 M.J. 458, 460 (C.M.A. 1982). Closely related cases are those in which "coactors [are] involved in a common crime,

servicemembers [are] involved in a common or parallel scheme, or [there is] some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288. Cases may also be closely related if the charges are similar in nature and seriousness. *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994). If the cases are closely related and the sentences are highly disparate, the disparity must be supported by a rational basis. *Lacy*, 50 M.J. at 288. When a wide disparity exists for reasons without a rational basis, we have the discretion to remedy the problem. *Kelly*, 40 M.J. at 570. The appellant bears the burden of demonstrating that any cases are closely related and that the sentences are highly disparate. *Lacy*, 50 M.J. at 288. The purpose of sentence comparison in closely related cases is to achieve "relative uniformity." *Olinger*, 12 M.J. at 461. Relative uniformity, however, does not mean mathematical equivalency. *Id.*

Applying the criteria set forth in *Kelly* and *Lacy*, we find that the appellant has not met his burden of demonstrating that his case is closely related to that of Corporal (CPL) G, LCpl F, or LCpl Q. The appellant committed his crimes while he was in a forward deployed unit in Guantanamo Bay, Cuba, which is a high profile, mission-critical environment. The other Marines' crimes were committed while they were in garrison at Camp Lejeune. The appellant was the victims' squad leader, entrusted with his victims' care as a noncommissioned officer. We are unable to determine, based on the information provided, that the other Marines were squad leaders, or were in positions of direct or

immediate command over their victims. The appellant's course of conduct was not similar in nature and seriousness to those of CPL G, LCPL F and LCPL Q, and did not arise from a common scheme. Unlike the other Marines, the appellant's maltreatment of his subordinates included sexually perverse acts, and his assault consisted of pointing a loaded 9mm pistol at the chest of one his subordinates. Thus, the appellant has failed to carry his initial burden, and therefore further examination of his disparity argument is unnecessary.

However, even assuming, *arguendo*, that the cases are closely related, we find the appellant has failed to show that the sentences adjudged are highly disparate. *Lacy*, 50 M.J. at 288. To the contrary, the sentences adjudged are nearly identical, in that they all included a bad-conduct discharge, a period of confinement, and a reduction in pay grade to E-1.[6] The fact that CPL G, LCpl F, or LCpl Q had pretrial agreements that required the CA to suspend their punitive discharges is not enough to make the sentences "highly" disparate. "[T]he military system must be prepared to accept some disparity in the sentencing of codefendants, provided each military

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[6] The appellant was sentenced to a bad-conduct discharge, confinement for three months, hard labor without confinement for three months, and reduction to pay grade E-1. The sentence adjudged to CPL G was a bad-conduct discharge, confinement for 120 days, reduction in pay grade to E-1, and forfeiture of $500 pay per month for four months. The sentence adjudged LCPL F was a bad-conduct discharge, confinement for 150 days, and reduction in pay grade to E-1. LCPL Q was adjudged a sentence extending to a bad-conduct discharge, confinement for eight months, reduction in pay grade to E-1, and forfeiture of $795.00 pay per month for eight months.

accused is sentenced as an individual." *United States v. Durant*, 55 M.J. 258, 261 (C.A.A.F. 2001)(citing *United States v. Taylor*, 991 F.2d 533, 536 (9th Cir. 1993)).

Finally, even if the appellant had satisfied his burden of establishing that the sentences are highly disparate, the record contains sufficient information to support a rational basis for that disparity. The appellant was a squad leader of Marines in a mission-critical, forward deployed environment, who seriously abused his authority by hazing and maltreating his subordinates by ordering his subordinates to perform humiliating, degrading, and perverse acts. In addition, he pointed a loaded 9 mm pistol at the chest of one subordinate. Hence, there is a rational basis for the differences in sentences approved by the convening authority in each of the cases. This assignment of error is without merit.

Conclusion

The findings and the sentence as approved by the CA are affirmed.

Senior Judge HARTY and Judge FREDERICK concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix E

Affidavit of Jason M. RYAN,
Corporal, U.S. Marine Corps, Appellant.

July 24, 2008

I, Corporal Jason M. Ryan, declare that the following statement is true, under penalty of perjury pursuant to 28 U.S.C § 1746.

I. Request for Continued Representation

1) I respectfully request that LT Darrin MacKinnon, JAGC, USNR, file this petition for a grant of certiorari to the United States Supreme Court on my behalf as part of his official duties as my appellate defense attorney and in his capacity as a reserve military attorney.

2) I respectfully request that LT MacKinnon continue to represent me in my military appeal as part of his official duties as a reserve military attorney and that he continue his ongoing attorney-client relationship with me, which was established when he served on active-duty.

3) I also request that LT MacKinnon continue to represent me as part of his official duties as a reserve military attorney for any further proceedings related to my case in any other forum, including my sentencing argument.

II. My Attorneys Failure to Communicate

4) No other attorney or organization has communicated with me about my appeal other than LT MacKinnon.

5) Nobody else other than LT MacKinnon has ever contacted me in regards to my right to appeal my case to the United States Supreme Court. I have not received any letters, messages, e-mails or phone calls from any other organization or attorney about my right to appeal to the United States Supreme Court.

6) After LT MacKinnon left active duty in September 2007, I never received any letters, messages, e-mails or phone calls from any other organization or attorney informing me who my new active-duty appellate defense attorney was.

7) I have lived in the same house, at the same address (180 Fairview Rd. Kersey PA, 15846) since June 18, 2004, the day that I returned home from the Marine Corps. My phone number has also been the same since then: (814) 885-6094.

8) Neither of the other two military attorneys detailed to my case talked to me about my case in as much depth as LT MacKinnon did.

9) I did not receive an answer to my request for further representation from my active-duty appellate attorney.

10) LT MacKinnon is the only attorney who informed me that I could appeal to the United States Supreme Court since I returned home from the Marine Corps on appellate leave.

III. Refusal to Petition the Supreme Court

11) After the Court of Appeals for the Armed Forces (CAAF) affirmed the findings in sentence in my case, I sent an e-mail message to the active-duty appellate attorney, LT S, who LT MacKinnon told me was detailed to my case after his departure. I sent an e-mail message on Sunday, June 8, 2008, at 17:14:59, to LT S of the Navy-Marine Corps Appellate Defense Division (Code 45). In that e-mail message to LT S, I identified myself as a military client and asked for legal representation in my appeal. But I did not receive a response.

IV. My Sentencing Argument

12) I am challenging my sentence to a bad-conduct discharge, which is a lifelong stigma and characterizes the service to my country in the same way as that of deserters, drug-users, drunks, thieves and other common criminals. But my bad-conduct discharge was based primarily on two incidents: 1) pointing a weapon at a subordinate; and 2) ordering subordinates to dance.

13) **The Weapon-Pointing.** My sentence of a bad-conduct discharge is largely based on a mischaracterization of the most serious charge against me. Contrary to what the Navy-Marine Corps Court of Criminal Appeals (NMCCA) stated in

its opinion, I was not convicted of pointing a loaded 9mm weapon at a subordinate Marine. I pointed an empty 9mm weapon at the subordinate, not a loaded one. There is a huge difference.

14) And this weapons-pointing incident occurred in the context of weapons training, not out-of-the-blue. We (Chris VanVlete and I) were training subordinate Marines how to take down, clean and put back together the 9mm service pistol. In this case, after the junior Marine had put the weapon back together, I pointed the 9mm pistol at the subordinate when the weapon was cleared and the slide was locked in the rear position.

15) Marines point weapons at each other all the time. It is part of our training. When we conduct mock patrols, raids or firefights, Marines always point weapons at each other.

16) **The Dance.** Contrary to what the Navy-Marine Corps Court of Criminal Appeals (NMCCA) stated in its decision, I did not order my subordinates to perform "humiliating, degrading and perverse acts." I simply ordered them, briefly, to dance with each other, in order to make a training point.

17) I never ordered any of my Marines to touch each other. Once the story got told once, it grew like a fishing story. More details were added, and because I was the senior Marine on site, I got the blunt of the trouble.

18) **Hazing.** At Guantanamo, I did nothing to my subordinate Marines that was not done to me or my peers when we were 'boots' – new Marines to the

Fleet Marine Force. The other three corporals that were in the room with me and acted like me went through the same treatment as I did. The training was not meant to hurt the junior Marines, it was meant to make them a closer unit. That is what happened to us when we were junior Marines.

19) While it is true that I "hazed" Marines, these instances were brief and minor and were done for training only. I was the only non-commissioned officer (NCO) that took his Marines on patrols, and tried to teach them what life is like in a combat zone. I wanted them to become closer than brothers and understand that they need to count on each other no matter what the situation is. I never, ever wanted to hurt or cause harm to my Marines. I only wanted the best for them and for them to be the best. The other two junior Marines in my squad did not say that I "hazed" them. They agreed that I was only training them.

20) I had a stellar Marine Corps record prior to this incident. I was put on NCO of the quarter boards, meritorious sergeant boards and highly recommended for re-enlistment into the Marine Corps.

21) The punishment for these incidents was aggressive. I served time in the brig, lost all my rank, lost all my pay, and was awarded a bad-conduct discharge. Two of the other Marines that were with us only received a loss in rank and pay. They finished their careers and received Honorable Discharges.

22) To demonstrate my character and the kind of person that I am, when I returned home on appellate leave, I began to attend college at Penn State University. I received two Associate Degrees, one in Materials Engineering and the other in Mechanical Engineering. I am currently finishing my Bachelors of Science (BS) degree (December of 2008). My wife has also given birth to two beautiful babies, one boy and one girl. I am currently an Operations Manager of a medium sized manufacturing company.

23) I respectfully request that this Court allow me the opportunity to make another sentencing argument to demonstrate that a bad-conduct discharge was inappropriately severe and disproportionate to the punishment received by other Marines who committed the same misconduct.

ss/ Jason M. RYAN,
Corporal, U.S. Marine Corps
July 24, 2008

Supreme Court, U.S.
FILED
NOV 28 2008
OFFICE OF THE CLERK

No. 08-422

IN THE

Supreme Court of the United States

JASON M. RYAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR REHEARING

DARRIN W.S. MACKINNON*
Lieutenant, JAGC
U.S. Navy Reserve
**Counsel of Record*

14232 Catbird Drive
Gainesville, VA 20155
(703) 930-5161

Counsel for Petitioner

No. 08-422

IN THE

Supreme Court of the United States

JASON M. RYAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

CERTIFICATION OF COUNSEL

I, DARRIN W.S. MACKINNON, Lieutenant in the U.S. Navy Judge Advocate General's (JAG) Corps, counsel for petitioner, Corporal Jason M. Ryan, USMC, certify that the following Petition for Rehearing is presented in good faith and not for delay.

DARRIN W.S. MACKINNON,
Lieutenant, JAGC
U.S. Navy Reserve
**Counsel of Record*

14232 Catbird Drive
Gainesville, VA 20155
(703) 930-5161

Counsel for Petitioner

QUESTION PRESENTED

Whether a military defense counsel's refusal to honor a military servicemember's request to appeal his case to the Supreme Court effectively denies him that right under the UCMJ, and, whether that refusal to appeal constitutes ineffective assistance of counsel?

PETITION FOR REHEARING ON DENIAL OF A WRIT OF CERTIORARI

Corporal Jason M. Ryan, a member of the United States Marine Corps, respectfully petitions for a rehearing on this Court's order of November 3, 2008, denying his writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

GROUNDS FOR REHEARING

This Court should grant a rehearing of Corporal Ryan's case because two intervening circumstances of a substantial effect have occurred since this Court's order denying his petition for a writ of certiorari.

The first intervening circumstance is that after this Court denied Corporal Ryan's petition for a writ of certiorari, the Department of the Navy launched a criminal and ethical probe against Corporal Ryan's reserve appellate defense attorney (the undersigned attorney). Appendix A.

Corporal Ryan's petition alleged ineffective assistance of appellate counsel when his active duty military counsel completely neglected to communicate with him and failed to advise Corporal Ryan that he had a statutory right to appeal his court-martial conviction to this Court.

More generally, Corporal Ryan's petition alleged pervasive negligent practices in the military's appellate defense system. Corporal Ryan documented in his certiorari petition how the appellate defense divi-

sions of the armed services systematically refuse to file certiorari petitions to this Court, year after year, constantly abandoning their servicemember clients and disregarding the mandate of Article 70(c), UCMJ, which provides: "Appellate defense counsel shall represent the accused before...the Supreme Court--(1) when requested by the accused;..."

Corporal Ryan's writ argued that he was denied an opportunity to put forward a complete defense, particularly contesting his bad-conduct discharge, when his active duty appellate defense attorney failed to communicate with him in any way. Corporal Ryan based his argument on *Strickland v. Washington*, 466 U.S. 688 (1984) and *Anders v. California*, 386 U.S. 738 (1967). When an appellate attorney completely fails to communicate with his client or advise his client that he has a right to appeal, the attorney flouts this Court's holding in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). In *Roe v. Flores-Ortega*, this Court stated: "We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Id.*, 477. A client cannot instruct his attorney to appeal if he does not even know he has the option to appeal.

The Department of the Navy launched a criminal and ethical probe against Corporal Ryan's reserve appellate defense attorney on November 17, 2008, fourteen days *after* this Court denied Corporal Ryan's petition for a writ of certiorari. The criminal and ethical probe specifically cited Corporal Ryan's petition as a genesis of that probe.

The posture of Corporal Ryan's petition has thus changed dramatically since this Court denied his petition for a writ of certiorari on November 3, 2008.

Corporal Ryan's original petition alleged errors of omission by pointing to what his active duty appellate defense counsel failed to do. Now, the Department of the Navy has raised the stakes and hoisted Corporal Ryan's case like a banner to endorse his active duty appellate counsel's ineffectiveness. The Department of the Navy has retaliated against the reserve attorney who alleged pervasive negligent practices in the military's appellate defense system, essentially ratifying these negligent practices and putting them forth as a policy preference.

Corporal Ryan understands that the Supreme Court of the United States is not primarily an "error-correcting court." But this Court should now take another look at Corporal Ryan's petition because of the unique posture in which his case currently stands: Corporal Ryan's reserve appellate defense attorney alleged ineffectiveness by his active duty appellate defense attorney. And the Department of the Navy now disputes *who* Corporal Ryan's real appellate defense attorney actually was.

A conflict among military counsel such as this will not likely rise again. But Corporal Ryan's fundamental criticism that military appellate defense counsel routinely fail to provide adequate representation to servicemembers will remain a problem, "capable of repetition, yet evading review." *See Honig v. Doe*, 484 U.S. 305 (1988); *Roe v. Wade*, 410 U.S. 113, 125 (1973).

Corporal Ryan's petition presents an important case about the statutory and ethical scope of defense representation in the military and the proper role of the military defense attorney. Corporal Ryan's reserve appellate defense attorney's response to the Department of the Navy, Appendix B, explains why

an appellate defense advocate must demonstrate unfettered loyalty to his client – a universally accepted principle that the Department of the Navy now seems willing to repudiate by attacking Corporal Ryan's reserve military defense attorney.

The second intervening circumstance after Corporal Ryan's petition was denied is this Court's grant of certiorari in *United States v. Denedo*, Case Number 08-267, on November 25, 2008. The *Denedo* grant of certiorari vindicates Corporal Ryan's position that this Court almost always exercises certiorari jurisdiction over cases involving servicemembers against the servicemember's interests and in favor of the government. In fact, this Court seldom shows interest in servicemember cases at all (only eight times since Congress established that authority 25 years ago under the Military Justice Act of 1983). Based on the government's arguments in *Denedo,* it is yet another case granted to protect the government's interests, not those of servicemembers.

In light of this Court's new *Denedo* grant, rehearing Corporal Ryan's case will establish a reasonable balance between the government's interests and those of servicemembers. Granting certiorari in Corporal Ryan's case will also reverse the sense that this Court is largely indifferent to the right of servicemembers to be represented before this Court. This Court's apparent indifference to the rights of soldiers, sailors, airmen and Marines contrasts dramatically with its historic preference for the interests of the government, as reflected in the *Denedo* grant. Finally, granting Cpl Ryan's petition will reverse the sense that this Court displays less interest in servicemembers than enemy combatants.

Servicemembers lose many rights when they

volunteer to serve our nation. *Parker v. Levy*, 417 U.S. 733 (1974). They also subject themselves to a host of much stricter criminal sanctions under the UCMJ. Accordingly, servicemembers should be advised of their right to have their cases reviewed by this Court under 28 U.S.C. § 1259(3) and 10 U.S.C. § 870(c), Art. 70(c), UCMJ. A military defense counsel who completely fails to communicate with his client and fails to advise his client of the right to appeal to this Court violates the UCMJ and is ineffective.

CONCLUSION

Corporal Ryan respectfully requests the Court grant this petition for a rehearing.

This Court may remand Corporal Ryan's case to the Court of Appeals for the Armed Forces (CAAF), which is authorized under military law to order findings of fact and conclusions of law regarding Corporal Ryan's appellate representation and the military's appellate defense practices. *See United States v. DuBay*, 37 C.M.R. 411, 413 (C.M.A. 1967).

Respectfully submitted,

Darrin W.S. MacKinnon*
Lieutenant, JAGC
U.S. Navy Reserve
**Counsel of Record*

14232 Catbird Drive
Gainesville, VA 20155
(703) 930-5161

November 2008

APPENDIX A

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON NAVY YARD
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON DC 20374-5066

IN REPLY REFER TO
1610
Ser 13/4PR13421.08
17 NOV 2008

From: Assistant Judge Advocate General (Civil Law)(Acting), Office of the Judge Advocate General

To: Commanding Officer, Defense Institute of International Legal Studies Reserve Unit

Subj: PROFESSIONAL RESPONSIBILITY AND ETHICS ISSUES INVOLVING CONTINUED REPRESENTATION OF ACTIVE DUTY CLIENTS AFTER DETAILED COUNSEL'S TERMINATION OF ACTIVE DUTY

Encl: (1) Writ of Certiorari ICO Ryan

1. I am writing to you in my capacity as Rules Counsel for the Judge Advocate General Corps as well as an ethics counselor for the Office of the Judge Advocate General. Facts have been brought to my attention regarding Lieutenant Darrin MacKinnon, JAGC, USNR, and his representation of a former

military client that raise concerns. As set forth in more detail below, LT MacKinnon filed Writs of Certiorari (Writs) before the U.S. Supreme Court on behalf of several former military clients. His actions potentially violate JAGINST 5803.1C as well as 18 U.S.C. § 205.

2. The facts as relayed to me are as follows. LT Darrin MacKinnon, prior to leaving active duty (AD), worked at Code 45 (appellate defense). LT MacKinnon left AD in September 2007 and now works for the Department of State (DOS). He remained with the Navy Reserve and is currently assigned to the Defense Institute of International Legal Studies (DIILS). His assigned duties do not include practicing military justice.

3. While on AD at Code 45, LT MacKinnon represented Corporal Ryan, USMC, during the appellate process. In *United States v. Ryan*, Appellant was detailed new military appellate counsel when LT MacKinnon left AD. Upon review, the Court of Appeals for the Armed Forces (CAAF) affirmed the case. The newly-appointed appellate counsel advised Appellant there was no merit in filing a Writ with the U.S. Supreme Court and refused to file. Appellant then contacted LT MacKinnon who filed a Writ on his behalf. In the Writ, LT MacKinnon wrote, "[t]he undersigned attorney, still a member of the United States Navy Reserve...pleading for assistance. The undersigned attorney, now serving as a Foreign Service Officer in Peshawar, Pakistan, agreed to assist and hastily assembled this Petition in one day." Enclosure (1). The Writ was signed "Darrin W.S. MacKinnon*,

Lieutenant, JAGC, U.S. Navy Reserve, *Counsel of Record, 14232 Catbird Drive, Gainesville, VA 20155, (703) 930-5161." *Id.* At 13. It is also my understanding that LT MacKinnon has since filed at least two additional Writs before U.S. Supreme Court on behalf of two other Service Members.[1]

4. Once established, the attorney-client relationship may be severed only by the accused's express release of the attorney, by a court order, or for other "good cause." A military defense counsel's release from AD normally constitutes good cause for severing the attorney-client relationship.[2] Nevertheless, an accused and former military counsel may affirmatively enter into a voluntary agreement extending the attorney-client relationship beyond the counsel's departure from active duty, so long as the defense counsel *then acts as civilian counsel* at no expense to the government. *See generally United States v. Andrews*, 21 U.S.C.M.A. 165, 44 C.M.R. 219 (C.M.A. 1972); *see also* AR 27-10, Appendix C. Additionally, if the attorney obtains a Reserve commission, he may be ordered to represent the

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[1] I have not received copies of the additional two Writs.

[2] *See, e.g., United States v. Spriggs*, 52 M.J. 235, 246 (C.A.A.F. 2000)(discussing that while the facts of the case at hand failed to even form a qualifying attorney-client relationship, in general, absent government misconduct, routine separation from active duty constitutes good cause for severance); *United States v. Dahood*, 32 M.J. 852 (N.M.C.M.R. 1991); *United States v. Richter*, 37 M.J. 615 (A.C.M.R. 1993); *United States v. Lolagne*, 11 M.J. 556 (A.C.M.R. 1981); *United States v. Greenwald*, 37 M.J. 537 (A.C.M.R. 1993); *United States v. Harris*, 8 M.J. 668 (A.C.M.R. 1979); *United States v. Jones*, 4 M.J. 545 (A.C.M.R. 1977); Manual of the Judge Advocate General, Section 0131(d)(2007)

client to the extent permitted by law and based on a determination by the appropriate official of reasonable availability. *See United States v. Spriggs*, 52 M.J. at 245-46 (citing *Cf.* para. 1b(2), App. C., AR 27-10). In the case at hand, to the best of my knowledge, LT MacKinnon has not been ordered by your unit to continue the representation (nor was an IMC request received).[3] LT MacKinnon cannot make the unilateral decision to detail himself to these cases in his Reserve capacity; and his filing with the U.S. Supreme Court, at least by implication, indicates he is representing Corporal Ryan in his Reserve capacity.

5. The actions of LT MacKinnon concern me from a professional responsibility perspective. JAGINST 5803.1C, Rule 1.5, Fees, restricts a Reserve Judge Advocate who has initially represented a client

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[3] Note: AR 27-10 has changed since the decision in *United States v. Spriggs*, however, the discussion in *Spriggs* has not been repudiated. AR 27-10 now states: (2) *Dissolution.* An attorney should not normally be assigned as a counsel to a case unless he or she can be expected to remain for trial. If it appears that he or she will not be available for trial, the client must be notified at the inception of the relationship. Military requirements or orders to move the attorney (as proper personnel management requires) will be respected. An attorney will not, without his or her own agreement, be retained on duty beyond a service appointment merely to maintain an existing relationship with respect to a particular case or client. Since no authority exists to hire a civilian attorney at Government expense to represent a Soldier in a court-martial, no former officer should expect to be retained by the Government to represent a Soldier with whom that officer had developed an attorney-client relationship. It is regarded as unethical for an attorney to arrange that only he or she could continue in any particular case.

concerning a matter as part of the attorney's official Navy duties, from accepting any salary or other payments as compensation for services rendered to that client in a private capacity, *unless so authorized by the JAG.* Rule 1.5 also places limitations on a U.S. Government (USG) attorney from using an official position to solicit or obtain clients for a private practice. While I am not aware of LT MacKinnon accepting fees or improperly soliciting clients, as Rules Counsel I would like to ensure he is aware of these restrictions.

6. Rule 1.7, Conflicts of Interest, states that the conflict of interest rules apply to Reservists only while they are actually drilling or on active duty. Therefore, unless otherwise prohibited by criminal conflict of interest statutes, Reserve attorneys providing legal services in their civilian capacity may represent clients, or work in firms whose attorneys represent clients, with interests adverse to the United States. But if a Reserve attorney represents, in their civilian capacity, persons whose interests are adverse to the DON, they will provide written notification to their supervisory attorney and commanding officer, detailing their involvement in the matter. *See* Rule 1.7, Comment (10). Again, as Rules Counsel, I want to ensure LT MacKinnon is aware of his responsibilities.

7. Finally, I am concerned with potential misrepresentations to the court and the parties as to LT MacKinnon's capacity. His statements in the Writ, which identify that he is off AD and now in the Reserves, implies that he is representing Appellant in his Naval Reserve capacity. Failure to correct this

implication could potentially violate Rule 3.3, "Candor and Obligations towards the Tribunal," or Rule 4.1, "Truthfulness in Statements to Others," because he is arguably "misrepresenting" himself. Additionally, LT MacKinnon should be informed that his representation is not covered by the Navy for purposes of malpractice issues and/or insurance.

8. It is permissible for a Reserve Judge Advocate, in his civilian capacity, to represent a former client under Navy JAG professional responsibility rules, provided the representation is pro bono and the judge advocate informs his supervisory attorney and Reserve Commanding Officer in writing. Thus, while the facts provided do not clearly demonstrate a professional responsibility violation, I am concerned that one might exist, and that LT MacKinnon needs to be aware of his restrictions and obligations. I leave it to your determination as to whether the procedures outlined in Enclosure (2), JAGINST 5803.1C need to be pursued after additional facts are obtained.

9. LT MacKinnon, however, must also comply with federal criminal conflict of interest statutes. Since LT MacKinnon is an employee of the DOS, the most relevant statute is 18 U.S.C. § 205.[4] In pertinent part, it states: "Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, other than in the

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4 *See also* 18 U.S.C. § 203 (similar criminal statute but generally applies when the counsel accepts fees for the representation).

proper discharge of his official duties...(2) acts as an agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest; [shall be subject to the penalties identified in 18 USCS § 216]....(d)(1) Nothing in subsection (a) or (b) prevents an officer or employee, *'if not inconsistent with the faithful performance of that officer's or employee's duties*, from acting without compensation as agent or attorney for, or otherwise representing— (A) *any person who is the subject of disciplinary*, loyalty, or other personnel administration proceedings in connection with those proceedings; or..." (Emphasis added).

10. Under this statute an attorney who works for the federal government may not act as an agent against the federal government. The statute identifies exceptions. None of those exceptions, however, appear to apply to the facts of this case.[5] Should any exception apply, LT MacKinnon must receive permission from DOS (his federal employer) to continue his representation. *See, e.g.*, 5 C.F.R. 3801.106. Regardless of whether an exception does apply, LT MacKinnon should inform DOS of his actions. Of note, violations of 18 U.S.C. § 205 carry potential criminal sanctions.

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[5] Despite the absence of case law defining "disciplinary," the general consensus is that the term refers to administrative proceedings vice courts-martial based on the context of the section's remaining language.

11. The actions of LT MacKinnon concern me in my capacity as Rules Counsel and as an ethics counselor. While I have not initiated formal processing in this case, I bring these facts to your attention, so that you may take any action you deem necessary to resolve the matter. If LT MacKinnon believes he is representing these clients in his Reserve capacity he needs to be advised appropriately. If his representations are in his civilian capacity, such representations must be pro bono, and not contrary to 18 U.S.C. § 205.

12. Regardless of your method of inquiry, please contact me within 30 days from receipt of this letter to report the facts and your actions/recommendations in this matter. If you have any questions or concerns, please do not hesitate to contact me or my action officer in this matter, LCDR Kathleen Elkins, 703-614-7403, Kathleen.elkins@navy.mil.

//s//
C.N. MORIN

Copy to:
RADM Norton Joerg, JAGC
RDML (Sel) Steven Talson, JAGC, USNR
Code 02, OJAG

APPENDIX B

Darrin W.S. MacKinnon
14232 Catbird Drive
Gainesville, Virginia 20155

1610
28 Nov 2008

From: Lieutenant Darrin W.S. MacKinnon, JAGC, USNR

To: Assistant Judge Advocate General (Civil Law), Office of the Judge Advocate General

Via: Captain Stephen R. Sarnoski, JAGC, USNR

Subj: PROFESSIONAL RESPONSIBILITY AND ETHICS ISSUES INVOLVING CONTINUED REPRESENTATION OF ACTIVE DUTY CLIENTS AFTER DETAILED COUNSEL'S TERMINATION OF ACTIVE DUTY

Ref: (a) Code 13 letter 1610 dtd 17 Nov 2008
(b) *United States v. Ryan*, ___ U.S. ___ (2008) (denying cert.)
(c) JAGINST 5803.1C
(d) 18 U.S.C. § 205
(e) Art. 70, UCMJ, 10 U.S.C. § 870
(f) Art. 92, UCMJ, 10 U.S.C. § 892
(g) R.C.M. 1202(b)(2)
(h) ABA Model Rules, *Client-Lawyer Relationship*, Rule 1.3 Diligence
(i) Virginia Disciplinary Rule 2-108(C)

(j) Virginia Disciplinary Rule 7-101(A)
(k) Virginia Legal Ethics Op. 1558, *Withdrawal of Representation,* Oct 20, 1993
(l) Virginia Legal Ethics Op. 1005, *Duty to File Post-Conviction Motions*, Nov 24, 1987
(m) ABA Rules of Professional Responsibility, Ethical Consideration 5-1

Encl: (**Enclosures are not included in this Petition*).

1. I have represented my military clients with loyalty, honesty, zeal, in good faith, without compensation, and in keeping with the highest traditions of the Navy Judge Advocate General's (JAG) Corps. This letter is respectfully submitted in response to reference (a). My clients and my JAGC colleagues can attest to my dedication.

2. I am a JAGC Lieutenant in the drilling Navy Reserve, currently assigned to the Defense Institute of International Legal Studies (DIILS), NR DIILS 501, in Newport, Rhode Island. My full-time employment is as a Foreign Service Officer for the United States Department of State. I currently serve as the Political-Economic Officer, United States Consulate, Peshawar, Pakistan. I am a member of the State Bar of Virginia and the American Bar Association.

3. I was detailed by the Judge Advocate General of the Navy, via the Director of the Navy-Marine Corps Appellate Defense Division (OJAG, Code 45), to represent my military clients as part of my official military duties while serving at Code 45 from November 2005 through September 2007, when I left

active duty. I immediately affiliated with the Navy Reserve when I was discharged from active duty in September 2007.

4. I have both a professional ethical duty as a lawyer and a military duty as a naval officer to zealously represent my clients and to provide them with the best defense possible, without fear of retaliation, including the full range of appellate representation, up to and including the Supreme Court of the United States.

a. I have a duty as a lawyer licensed in the Commonwealth of Virginia to zealously represent my clients. According to the Virginia state bar, Disciplinary Rule 7-101(A)[DR:7-101] a lawyer must seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules. This rule imposes an ethical duty on me to file motions on behalf of my clients. *See* Legal Ethics Opinion [LEO] 1005, *Duty to File Post-Conviction Motions*, November 24, 1987. Moreover, DR 2-108(C), states that counsel of record *shall not withdraw* except by leave of court after notice to the client of the time and motion for leave to withdraw. In addition, LEO 1558, *Withdrawal of Representation*, requires me to take *all steps necessary* to avoid prejudice to the client's rights before withdrawing. (If I know that an active-duty detailed counsel is not communicating with my client and/or will not file pleadings or arguments in court advancing our common client's interest, then I am required to take all steps necessary to avoid prejudice to my client's rights, which includes filing a pleading in court advancing the client's interest.)

ABA Ethical Consideration 5-1 [EC: 5-1] provides that as an attorney, I should exercise my professional judgment within the bounds of the law, solely for the benefit of my client, free from compromising influences and loyalties. Under EC: 5-1, neither the attorney's personal interest, nor the interest of other clients, nor the desires of third persons should be permitted to encumber this loyalty. As a lawyer, I therefore owe unfettered loyalty to my military clients. Except for obvious limitations, this duty must supersede the needs of society, the military, the Navy, the JAG Corps, my supervisors, my colleagues — and even surpass my own prospects for promotion.

b. I have a duty as a military lawyer to zealously represent my clients. Under the Uniform Code of Military Justice (UCMJ), Congress has mandated, "Appellate defense counsel shall represent the accused . . . ." Art. 70, UCMJ, 10 U.S.C. § 870. The President of the United States has also required an appellate defense counsel to "represent the accused." R.C.M. 1202(b)(2). And the Judge Advocate General of the Navy has required in a regulation that binds all Marine and Navy judge advocates: "Nothwithstanding a judge advocate's status as a commissioned officer subject, generally, to the authority of superiors, a judge advocate detailed or assigned to represent an individual member or employee of the Department of the Navy is expected to exercise unfettered loyalty and professional independence during the representation consistent with these Rules and remains ultimately responsible for acting in the best interest of the individual client." JAGINST 5803.1C, Professional Conduct of Attorneys Practicing Under the Cognizance and Super-

vision of the Judge Advocate General, Rule 5.4(a) (9 Nov 04). If I did not defend my military clients, then I could be committing a criminal offense under the UCMJ. Art. 92, UCMJ, 10 U.S.C. § 892.

5. My assigned duties did not end upon my departure from active duty. The attorney-client relationship with my military clients was never severed. I did not withdraw from my military cases. While other active duty appellate defense attorneys were added, that is, detailed to my military clients, after I left active duty, I was never "un-detailed." Nor was I ever notified of any such action. Customarily, an attorney must take the affirmative step of withdrawing from a case to sever the attorney-client relationship and terminate the attorney's duties to his or her client. I have not done so.

6. My practices and filings on behalf of my clients have been entirely transparent since I left active duty. I have filed scores of briefs and other submissions with the Navy-Marine Court of Criminal Appeals (NMCCA), the Court of Appeals for the Armed Forces (CAAF), and the Supreme Court of the United States on behalf of my military clients since I left active duty. I have placed my contact information (address, telephone number, e-mail) on all of these pleadings, clearly (and accurately) identified myself as a member of the Navy Reserve, and I have had numerous communications with both my active duty appellate counsel colleagues and government counsel on the other side. Two cases before the Court of Appeals illustrate this point. When one of my cases was decided on the merits, the CAAF, in keeping with its practice, listed me among the attorneys,

having been "on brief," referring to me as a JAGC Lieutenant in the Navy Reserve. *United States v. Moorefield,* 66 M.J. 170 (C.A.A.F. 2008) (per curiam). In another case, after I submitted a petition for review of a court-martial conviction for a Marine using my Navy Reserve title, the government moved to have me submit an affidavit to the court clarifying my status as either civilian or military. After I fully advised the Court of the facts and circumstances of my representation as a reserve attorney, the Court denied the government's motion. *United States v. Carromero,* 66 M.J. ____ (C.A.A.F. 2008) (mem.)(No. 08-144; May 7, 2008).

7. The Director of Code 45 contacted me in November 2007 (while I was attending Pashto language training at the Foreign Service Institute) to notify me that he had detailed other (active duty) counsel to my cases and urged me to "move on." But neither he nor his Deputy ordered me to withdraw, and neither has contacted me since then to discuss any reservations they may have with my continuing to represent my military clients as a reserve officer not on active duty. Code 45 has thus obtained the benefit of over 100 hours of my time over the course of a full year, during which I openly and continually filed pleadings, briefs and Court of Appeals "supplements" for military clients. I was never ordered to stand down and cease representing those clients.

8. My military clients specifically requested that I continue to represent them as their military attorney. I honored their requests. As a Navy reservist I filed these cases in an analogous manner to

how many other ex-Code 45 attorneys have continued to represent their clients after their departure from the Appellate Defense Division, even when their new assigned duties no longer included appellate representation. (Some ex-Code 45 attorneys have gone on to serve as Staff Judge Advocates, on military commissions, on "IA's," or at other OJAG Codes, where their "assigned duties" do not include appellate representation, either). I also consulted the State Bar of Virginia in December 2007, and was informally advised that there was no state ethical impediment to my continuing to represent individuals for whom I was appellate defense counsel after my release from active duty.

9. As directed by my Commanding Officer, Captain Sarnoski, I will now respond to each of the numbered paragraphs of reference (a).

a. In response to ¶ 1, I have filed three petitions for writs of certiorari for clients for whom I was detailed as appellate defense counsel: Corporal Jason M. Ryan, USMC, 1st Lt Raymon F. Thomas, USMC, and Sergeant Daqric B. Moorefield, USMC. All of these petitions were denied. I do not agree that filing these petitions violated either references (c) or (d).

b. The facts stated in ¶ 2 are correct to the extent that the last sentence is read to refer only to duties assigned in respect of my assignment to DIILS. It has been my understanding that my duties as appellate defense counsel survived my separation from active duty.

c. The fourth sentence in ¶ 3 is incorrect in part. Lieutenant William "Scott" Stoebner, JAGC, USN, declined to file a petition for a writ of certiorari for Cpl Ryan. Cpl Ryan emailed LT Stoebner asking to discuss the case, but I do not have LT Stoebner's response, if any. I have been informed by Cpl Ryan that he received no response. More importantly, Cpl Ryan informed me that he received *no communication* from anyone. Cpl Ryan was not even informed that he had a statutory right to appeal to the Supreme Court of the United States. Therefore, the statement that Cpl Ryan's "newly-appointed appellate defense counsel advised Appellant there was no merit in filing a Writ on his behalf" blatantly misrepresents the facts. Cpl Ryan was not "advised" of anything. No active-duty attorney ever contacted him. This is a serious problem and a central point I argued in the *Ryan* cert petition. [*Cf*, American Bar Association Model Rules of Professional Conduct *Client-Lawyer Relationship*, Rule 1.3 Diligence]. The last sentence of this paragraph is incorrect to the extent that it suggests that the *Ryan* certiorari petition was the first of the three to be filed. In fact, it was the third.

d. In response to ¶ 4, I did not detail myself to represent any client. I was detailed to represent each member I have assisted in military appeals. No one ever revoked my detail to any appellate case. None of the members I have continued to represent following my separation from active duty have requested that I no longer represent them, and indeed, each one from whom I have heard affirmatively requested that I continue to do so, after full disclosure of their options. I respectfully disagree

with this paragraph's narrow reading of *United States v. Andrews*, 21 U.S.C.M.A. 165, 44 C.M.R. 219 (1972). That case does not address the situation in which military appellate defense counsel leaves active duty but retains a reserve commission. *United States v. Spriggs*, 52 M.J. 235 (C.A.A.F. 2000), is wide of the mark because, as Judge (as then was) Effron noted (at 246), the counsel in question, "after his separation from active duty, did not agree to represent appellant either as a reserve judge advocate or as a civilian attorney." In contrast, I have been entirely willing to continue to represent those members for whom I was detailed as appellate defense counsel. While routine separation from active duty normally terminates the attorney-client relationship, doing so requires some affirmative step, and neither my clients, nor I, nor the Navy Department, ever took such a step. AR 27-10 does not apply to Navy judge advocates except when such judge advocates serve in connection with Army courts-martial. The fact that departure from active duty is good cause to sever an existing attorney-client relationship, *United States v. Lolange*, 11 M.J. 556, 557 (A.C.M.R. 1981), implies a need for affirmative action to sever, rather than severance by operation of law. The three post-separation certiorari petitions I have filed as appellate defense counsel for Marine clients indicate my reserve status because that is the capacity in which I rendered services.

e. I am aware of the restrictions noted in ¶ 5. The post-separation services I rendered to personnel for whom I was detailed as appellate defense counsel were rendered without fee. Prior to leaving active

duty I was properly detailed to represent each of the individuals for whom I have provided appellate defense services following my separation.

f. In response to ¶ 6, I am aware of my responsibilities under Rule 1.7. A list of the appellate defense cases on which I recall having worked following my separation in September 2007 is enclosed. See Enclosure (7). Copies of pleadings, briefs and "supplements," are available from the Appellate Defense Division, the Appellate Government Division, CMTIS database, and the files of the NMCCA and the CAAF. Both my active-duty colleagues and clerical staff at Code 45 have informed me that the CMTIS database continues to show me as counsel in the cases to which I was detailed while on active duty.

g. Contrary to ¶ 7, I have never knowingly misrepresented a fact or other matter, including my personal capacity, before any court of law. My pleading in the *Carromero* case before the CAAF, where I openly explain that I am acting in my capacity as a reserve attorney, speaks directly to this point. It has indeed been my understanding that my post-discharge representation of Naval Service personnel in matters to which I was properly detailed during my active duty, and from which I have never been relieved by the Navy or my clients, has been in my capacity as a Navy Reserve officer. I have not investigated the insurance or malpractice implications of doing so and I am therefore not in a position to agree or disagree with the last sentence of ¶ 7. But now, I at least understand Code 13's position.

h. Contrary to ¶ 8, a former active duty judge advocate may not only continue to represent a military client, but may charge a fee. Reference (a) cites no contrary authority. Please refer to Opinion 313 of The District of Columbia Bar Ethics Committee. *cf. United States v. Nguyen*, 56 M.J. 252 (C.A.A.F. 2001) (mem.). I have not violated reference (c), and there is no basis for invoking the complaint processing procedures set forth in Enclosure (2) thereof.

i. I am aware of the provisions cited in ¶ 9. They do not apply to the legal services I furnished to military clients for whom I have been detailed as appellate defense counsel. I have provided those services in my capacity as a Navy Reserve officer and not as a Foreign Service Officer. I consulted with a departmental ethics advisor concerning my representation of such clients and was told that I could continue to represent my military clients in my reserve capacity.

j. As suggested in ¶ 10, I will inform the appropriate office of the Department of State of my post-separation activities as appellate defense counsel for clients for whom I was detailed prior to my separation.

k. Most of ¶ 11 is addressed to the via addressee. In response to the last sentence, my post-separation appellate defense activities have been pro bono.

1. Paragraph 12 is addressed to the via addressee.

10. The practical implications of the position set forth in reference (a) should be very carefully considered. First, such a narrow authorization to practice appellate defense is antithetical to allowing Appellate Defense Division attorneys to complete their cases when moving to other assignments within the Navy or Marine Corps. Thus, the suggested position is overbroad and applies principles to my conduct that would prove too much. When appellate cases are "handed-off" to other attorneys, the new attorney seldom reads the record of trial and does not always call the client. The letter from CAPT Hans Graff, JAGC, USNR, a member of my reserve unit, and a prior member of Code 45's supporting reserve unit, explains why a military-rooted attorney-client relationship should and does survive a Judge Advocate's mere change in unit. Second, such a narrow authorization to practice appellate defense discourages the use of volunteers, thereby running counter to settled principles of naval leadership. Third, at a time when the Appellate Review Activity is only beginning to emerge from a long and embarrassing period during which delay was rampant and regularly violated clients' due process rights, *e.g.*, *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), it makes little sense to turn away a perfectly acceptable means of augmenting the regular complement of the Appellate Defense Division with experienced officers. The Navy active-duty and reserve component are an integrated "total force." Fourth, the position expressed in reference (a) would add to the ministerial burdens of all

concerned (to include NMCCA and the CAAF) by mandating formal motions to withdraw, and client consent, every time an Appellate Defense Division lawyer leaves that division. Fifth, the impact of the position suggested would undermine client confidence in the dedication, zeal, and above all, the loyalty of detailed Appellate Defense Counsel. No bright-line rules or black letter law applies to a reserve judge advocate's continued representation of his military clients. But Ethical Consideration 9-2 admonishes that "[W]hen explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession." By choosing to continue representing my military clients in the appeal process, including up to the Supreme Court, my conduct would inspire confidence in the public that servicemembers receive unfettered and continued loyalty and the full range of appellate defense. At the end of the day, perhaps the issues raised in ref (a) cry out for better management and clearer guidance, but not ethical allegations.

11. I am currently counsel of record in several fully-briefed cases in the NMCCA and the CAAF. Please advise as to whether in your office's view I have a duty to move for leave to withdraw. While I have put forward my position as forcefully as possible, if you or other competent authority so directs, in writing, I will of course obey, on notice to the affected clients.

12. Copies of reference (a) were sent to two Flag Officers and one other senior officer of our Corps. I would have hoped that I would be afforded an

opportunity to comment on the matters raised in it before, rather than after, the concerns expressed were shared with the highest levels of the JAG Corps. Since these ethical concerns have already been released, may I respectfully request that a copy of this letter be furnished to the carbon copy addressees of reference (a).

Very respectfully,

//s//

Darrin W.S. MacKinnon

cc(w/encls): Eugene R. Fidell, Esq.